SUPREME COURT, U. S.

No. 865

In The

Supreme Court of the United States

October Term, 1967

E. W. BUSCHMAN CO.,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY BRIEF OF PETITIONER IN SUPPORT OF PETITION

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Stripped to its essentials, our argument is this. The NLRB assumed the law to be that our company rule prohibiting any solicitation on company premises was invalid, even though it was agreed to by the union. The Board found that the company's motivation for the discharge of the employees was the circulation of the petition on company premises.[1] The Board then concluded there was a violation

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[1] The Trial Examiner, whose findings were adopted by the Board, found that *"the real reason for the respondent's discharging the three stewards* was their known participation in the preparation and presentation of the ouster petition to the other employees." (Joint Appendix, page 43a, emphasis added)

of 8 (a) (1), because such a motivation for discharge led to an interference with Section 7 rights. The Sixth Circuit, however, held that the no-solicitation rule was valid because of the union approval. It further held that the existence of that rule constituted a *waiver* of any Section 7 right to circulate petitions on company premises. Even though the rule expressly provided that violations of it were grounds for discharge (and there is no question that these employees acted in violation of the rule), the Sixth Circuit affirmed the Board and held the company had interfered with Section 7 rights. We argue that this is inconsistent and illogical.

The response of the Board's brief is to ignore our argument and to be ambivalent. At times, the brief asserts that the discharges were unrelated to the shop rule. ("(T)he discharges were not predicated on violation (sic) of the shop rule . . ."—p. 9, fn. 8) Any assertion that the discharges were unrelated to the employees' violation of the shop rule conflicts with the Sixth Circuit's interpretation of the Board's finding. The Sixth Circuit concluded that the Board found as one of the motivations for discharging these employees their violation of the shop rule. Said the Sixth Circuit in its opinion (Pet. App. 15):

> "The complaint charged and the Board found that the three shop stewards were discharged not only for violating the shop rule, but for preparing, signing and circulating the petition, protected activity under Section 7 of the Act."[2]

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[2] The internal inconsistency of the Sixth Circuit's decision in this case is well illustrated by the above quote. That quote indicates that the Sixth Circuit concluded there were two motivations for discharge (1) violation of the shop rule and (2) preparing and circulating the petition, with the latter being a protected activity under Section 7 of the act. The problem is that the existence of the shop rule, according to an earlier part of the decision, *waived* the Section 7 rights to circulate the petition. Therefore, the second motivation of circulating the petition is not a "protected activity under Section 7 of the Act." The next two sentences of the Sixth Circuit's opinion reads:

At other times, the Board's brief acknowledges that one of the two motivations for the discharge was a violation of the shop rule, but the company's other motivation, states the brief, was to interfere with the three employees' attempt to remove the International representative from the bargaining committee (p. 8). Because of the dual motivation says the Board, whether the shop rule is valid or invalid is therefore irrelevant.[3]

This is too facile. If the motivation for discharge in part is the violation of a valid shop rule, then the following questions are some that are raised which were never considered by the Board (or the Sixth Circuit):

1. The shop rule expressly provided that a violation was cause for discharge. Section 10 (c) of the Act prohibits reinstatement of an employee "discharged for cause." If the shop rule was invalid, 10 (c) is irrelevant. Because it is valid, 10 (c) is relevant. Therefore, would the Board change its result?[4]

"The thrust of the Board's finding was that the company wanted to remove the shop stewards who opposed the proposed contract and threatened the company with a strike. The Board found that the employees were not discharged merely because they solicited on company premises without the prior approval of management."

But this creates a whole series of new problems and questions. See discussion below.

[3] The brief states (p. 9) that the "invalidity of the shop rule is not a necessary predicate to the Board's finding that the discharges were unlawful." As the argument below shows it cannot be ascertained whether the invalidity of the shop rule is "a necessary predicate," because the rule's invalidity raises critical questions never considered by the Board.

[4] For instance, see *NLRB* v *Local 1229, IBEW*, 346 U.S. 464 (1953) where the discharge of striking employees who circulated handbills attacking the quality of the employer's product was held to be a discharge for cause under Section 10 (c). This Court cited the language of the Congressional Conference Report that the discharge for cause provisions of Section 10 (c) applied "whether or not the acts constituting the cause for discharges were committed in connection with a concerted activity."

2. The fact that discharged employees are involved in union related pursuits does not mean that they can engage in any and all conduct. Section 7 does not protect conduct that is unlawful,[5] violent,[6] a breach of contract,[7] or disloyal.[8] The conduct of these men — because of the validity of the shop rule — was (1) unprotected by Section 7 and (2) a breach of the contract.[9] The heart of the Board's decision is the finding of the trial examiner that the *real reason* for the discharge was "the preparation and presentation of the ouster petition to the other employees." Because that petition activity was unprotected activity, does that mean that the company is totally exonerated?

3. What if the company had failed to punish these dissident employees for circulating the petition at such a critical juncture? A failure to invoke a valid shop rule might mean that the company was discriminating *against* the union, the international, and its adherents, by allowing these dissidents to undercut them with a petition, meaning a violation of 8 (a) (3). Would this make any difference?

The answers to the above questions may or may not change the result. What is certain is that the Board should decide the effect on its result of a valid shop rule. This Court many times has required a clarification of the opinions, reasons and findings of an administrative agency before it will pass on the validity of the agency's conclusion. *Schaffer Transport Company* v. *U. S.*, 355 U.S. 83 (1957);

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[5] *Southern Steamship Co.* v. *NLRB*, 316 U.S. 31.

[6] *NLRB* v. *Fansteel Metallurgical Corp.*, 306 U.S. 240.

[7] *NLRB* v. *Sands Mfg. Co.*, 306 U.S. 332.

[8] *NLRB* v. *Local 1229, IBEW, supra.*

[9] The shop rule was enacted in pursuance to a power given to the company under the collective bargaining agreement and then was approved, upon issuance, by the union.

Secretary of Agriculture v. *U. S.*, 347 U.S. 645 (1954). Perhaps it is preferable for this Court to answer them.

The disagreement between the Board and the Sixth Circuit as to the validity of the shop rule, coupled with the conclusion that a violation of the rule played a role in the discharge, requires this court to grant our petition.

CONCLUSION

At the least, this Court should take this case in to resolve the conflict between the Board on one hand and the Sixth and Seventh Circuits, on the other, as to the validity of a company no-solicitation rule agreed to by the union. If this Court upholds the validity of the shop rule, which partially motivated the discharges, then this Court could consider, or remand to the Board or Sixth Circuit to consider, the impact of such on the order to reinstate. The Petition should be granted.

Respectfully submitted,

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